defendants had all the time been actively participating in this fraud, and were "rewarded" by the fourth and fifth defendants when they entered into an agreement employing them to mine the land, and which agreement was clearly in contravention of the provisions of the Malay Reservations Enactment and the Mining Enactment and the conditions in the mining certificate. In the circumstances I think fraud on the part of the fourth, fifth and sixth defendants on the higher balance of probabilities is sufficiently established.

Since the said permits to mine as well as the sublease are void, the fourth and fifth defendants could not thereby have any right or title in the land as against first and second plaintiffs, the registered sub-lessees; and the fourth and fifth defendants could not as such enter into any valid agreement with the sixth defendants. Even if they could, the agreement is void for the reasons stated earlier *viz.*, infringement of the provisions of the Malay Reservations Enactment, the conditions in the mining certificate and the provisions of the Mining Enactment.

Accordingly C.S. 514/69 is dismissed with costs. C.S. 464/69 as prayed with costs (one counsel). The third party costs is to be borne by the fourth, fifth and sixth defendants. Such costs to be taxed.

Order accordingly.

Solicitors: *J. R. Devadas; Lim Cheng Ean & Co.; Dharmananda & Co.*

ELIZABETH CHOO v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Raja Azlan Shah J.) June 25, 1960]

[Kuala Lumpur — Civil Suit No. 505 of 1968]

Negligence — Professional negligence — Anaesthetist performing pre-operation endoscopic examination — Standard of care and skill.

This was an action for personal injuries against the Government of Malaysia and the anaesthetist. It was alleged that owing to the negligence of the anaesthetist doing a pre-operation sigmoidoscopic examination the plaintiff suffered a perforation of the colon. As a consequence the plaintiff was unable to undergo a piles operation by reason of the nervous shocks she suffered from the perforation.

Held: having regard to the circumstances of this case the anaesthetist was competent to do the sigmoidoscopic examination and he had exhibited competent care and skill on the particular occasion and therefore negligence had not been established.

Cases referred to:-

(1) *Vancouver General Hospital* v. *MacDaniel & Anor.* (1934) 152 L.J. 56.

(2) *Hunter* v. *Hanley* (1955) S.L.T. 213 at p. 217.

(3) *Bolam* v. *Friern Hospital Committee* [1951] 2 All E.R. 118 at p. 122.

(4) *R.* v. *Bateman* (1925) 94 L.J. K.B. 791; [1925] All E.R. Rep. 45.

(5) *Rich* v. *Pierpont* (1862), 176 E.R. 16 at pp. 18 and 19.

(6) *Chin Keow* v. *Government of Malaysia & Anor.* [1967] 2 M.L.J. 45.

CIVIL SUIT.

S. D. K. Peddie for the plaintiff.

Ajaib Singh (Senior Federal Counsel) for the defendant.

Raja Azlan Shah J.: This is an action for damages for personal injuries against the Government of Malaysia and the anaesthetist. The plaintiff was admitted to the General Hospital, Kuala Lumpur for the purpose of piles operation but she left the hospital after 35 days without the operation being performed. Instead another operation had to be performed for the repair of her colon which was perforated due to the alleged negligence of the anaesthetist during the sigmoidoscopic examination. In consequence the plaintiff still suffers from haemorrhoids and is still unable to undergo the piles operation by reason of the nervous shocks she suffered from the perforation of her colon. She says she suffers and will continue to suffer pain and discomfort from her haemorrhoids.

The facts leading up to the present case can be briefly stated. The plaintiff is an employee of Messrs. Lindeteves-Jacoberg (Malaya) Sendirian Berhad, Kuala Lumpur. She consulted the company doctor, Dr. H. A. L. Wagner, with regard to her haemorrhoids and was recommended to see Mr. Alhady, the senior consultant surgeon, General Hospital, Kuala Lumpur. He admitted her and recommended an operation since he found that her haemorrhoids were at a very advanced stage. Before the operation a pre-operative sigmoidoscopic examination was to be performed by Mr. Alhady. He was then occupied and he delegated the examination to the anaesthetist. The anaesthetist performed the said examination under general anaesthesia. The sigmoidoscope which is about 16 cm. long is introduced into the rectum slowly using a certain amount of pressure. Great concentration is needed to see that the passage is not obstructed and that is done with the aid of the light in the instrument and by inflating the rectum with air. When the instrument reached the 13 cm. level the anaesthetist saw some blood and he was doubtful of some abnormal pathology. He consulted Mr. Alhady who carried out an immediate laparotomy when a small laceration was found and sutured and a temporary iliac sigmoid-colostomy carried out. It was also found that the plaintiff has a bicernuate uterus situated in front of the rectum. The colostomy was closed and the sigmoid colon replaced on October 4, 1967. She now bears two permanent scars on the upper and lower parts of her abdomen. The plaintiff made an uneventful convalescence except for some post-operative wound sepsis. She was later discharged.

Four particulars of negligence have been advanced against the anaesthetist:

(a) he failed to exercise due care and attention in the performance of the said sigmoidoscopy;

(b) he carried out the sigmoidoscopy after the administering of premedication to the plaintiff when he knew or ought to have known that the premedica-

tion would reduce her perception of pain and disable her from appreciating the traumatic perforation of her guf;

(c) he performed a sigmoidoscopy at a time when it was unnecessary;

(d) he failed to exercise reasonable care and gentleness in the manipulation of the plaintiff's sigmoid colon with the sigmoidoscope.

In my view (a) and (d) can be dealt with together.

I will deal first with (b) and this can be disposed of on comparatively simple considerations. Mr. Alhady who is a witness for the plaintiff is an eminent surgeon in this country and generally held in high esteem in the profession. He had successfully performed hundreds of sigmoidoscopic examinations under general anaesthesia. This technique is in vogue in his unit since 1956 and that technique had not earned the condemnation of medical opinion generally or of any medical man in particular except Dr. Wagner, who had expressed the view that it is better to perform sigmoidoscopy without anaesthesia because the patient could forewarn the anaesthetist of any pain. He recalled his own experience in undergoing sigmoidoscopic examination in Australia without anaesthesia. The anaesthetist in our present case had done his surgical training under Mr. Alhady and it was during his housemanship that he had acquired this technique of using general anaesthesia during sigmoidoscopy. He had successfully performed hundreds of sigmoidoscopic examination under general anaesthesia. No one had complained about this technique. The principle of law is well established that a practitioner cannot be held negligent if he treads the well-worn path; he cannot be held negligent if he follows what is the general and approved practice in the situation with which he is faced. There is the judgment of the Privy Council in *Vancouver General Hospital* v. *MacDaniel & Anor.*[1] for such a proposition. I might also refer to a statement which is contained in a Scottish case, *Hunter* v. *Hanley*[2] where the Lord President (Lord Clyde) said this:

"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion, and one man clearly is not negligent merely because his conclusion differs from that of other professional men. .... The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of it acting with ordinary care."

McNair J. in *Bolam* v. *Friern Hospital Committee*[3] put the matter in this way:

"A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.... Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view."

I think that disposes of this matter.

I am of the view that nothing turns on (c) as there exists abundant evidence from medical witnesses on both sides which are consistent with each other that sigmoidoscopy is necessary before haemorrhoidectomy is undertaken, to ensure that no rectal disease is present and particularly to exclude a neoplasm. This is in accord with the view expressed by *Charles Rob* and *Rodney Smith* in the 3rd Volume of Operative Surgery on page 17, a Butterworths Medical Publication.

I now deal with (a) and (d). It was stated by Mr. Peddie for the plaintiff that the courts are always reluctant to find negligence against a medical man. With respect that proposition cannot be true. To say the least I am no advocate of the right of medical men occupying a position of privilege. They stand in the same position as any other man. Their acts cannot be free from restraint; where they are wrongfully exercised by commission or default, it becomes the duty of the courts to intervene. The present case is not a new one. The point was argued on a number of occasions. The authorities on the point which were cited by counsel laid down propositions which are familiar to this court and that is that the standard of care expected of a medical practitioner is that he is not required to exercise the highest or a very high standard but only a fair and reasonable standard of care and skill in his treatment of his patients. That was exemplified in the judgment of Lord Hewart C.J. in *R.* v. *Bateman*.[4] Mr. Peddie claimed to be able to invoke the doctrine of *res ipsa loquitur* on the basis that the anaesthetist had failed to avoid perforating the intestine which he ought to have done. He seemed to take the view that the occurrence spoke of negligence on the part of the anaesthetist. In my judgment the doctrine could not be invoked by the plaintiff. There could be no presumption of negligence arising from the mere circumstance that the anaesthetist failed to avoid perforation because that might have been caused by causes beyond his control. Liability must depend on the plaintiff establishing that there had been a want of competent care and skill. The true test was, I think, expressed by Erle L.C.J., in *Rich* v. *Pierpont*[5] when, in summing up the case to the jury, he is reported to have said:

"It was an action charging him with a breach of his legal duty, by reason of inattention and negligence and want of proper care and skill; and if they were of opinion that there had been a culpable want of attention and care, he would be liable. A medical man was certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge. What that was the jury were to judge. It was not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question was whether there had been a want of competent care and skill to such an extent as to lead to the bad result."

The point, therefore, to be determined is whether the anaesthetist was competent to do the sigmoidoscopic examination, and if so, whether upon the occasion in question he did or did not exercise a reasonable and proper care, skill and judgment: see also *Chin Keow* v. *Government of Malaysia & Anor.*[6] This is a question of fact.

The anaesthetist obtained his degree of Bachelor of Medicine and Bachelor of Surgery in 1955. After his housemanship he was medical officer at the General

Hospital Penang for one year in surgery and anaesthesia. After that he was medical officer-in-charge of outpatients and officials and prisons in Penang. When in Penang he did anaesthesia under Dr. L. P. Scott and surgery under Mr. Alhady. He went to the United Kingdom and took his primary surgical F.R.C.S. in May 1961. He became a Fellow of the Faculty of Anaesthetics in the Royal College of Surgeons (F.F.A.R.C.S.) in 1962. When he came back he was again posted to the Penang General Hospital as a consultant anaesthetist until February 1965. In March 1965 he was transferred to the General Hospital, Kuala Lumpur and worked in Mr. Alhady's surgical unit, and it was quite common for Mr. Alhady to allow him to do endoscopic examinations.

It was put to him in cross-examination that endoscopic examination is not the work of an anaesthetist. In answer he said that the whole concept of modern anaesthetist is not only seeing the patient before and after the operation but he might be called upon to work in intensive care units and various diagnostic procedures such as passing catheters, performing endoscopic duties etc. He said that during his training in the United Kingdom he was taught to perform various endoscopic duties including sigmoidoscopy. In my view sigmoidoscopy does not involve utilisation of a new advance in technique which carries with it wholly unforeseen dangers and difficulties. It is being carried out every day as a pre-operative examination for piles surgery. Every houseman is trained to do sigmoidoscopy and any doctor with the minimum basic training is taught to use endoscopic instruments. Sigmoidoscopy has been accepted as a relatively minor operation.

The anaesthetist had done hundreds of endoscopic examinations including sigmoidoscopy in Penang and in Kuala Lumpur and had encountered no trouble except this particular mishap which Mr. Alhady described as unfortunate because it turned out that the plaintiff has a bicernuate uterus which according to him might have been the cause of the slight perforation during the examination. According to him the possibility exists. There is evidence that the greatest care is required to ensure free passage when the instrument is introduced into the rectum and the procedure required a high degree of concentration. The anaesthetist said he exercised all the care and caution he possessed at the time and although he was showing the houseman the sigmoidoscopy, at no time he said did he lift his sight from the mirror.

Having regard to all the circumstances of this case I am satisfied that the anaesthetist was competent to do the sigmoidoscopic examination and he had exhibited competent care and skill on that particular occasion. This was an unfortunate incident which does occur, though rarely, in such cases even with the most skilled treatment as was exemplified by Mr. Alhady in a similar case which did occur in the United Kingdom. The proposition that the bicernuate uterus is a contributory factor is not without force as the possibility suggested cannot altogether be ruled out. I have every reason to sympathise with the plaintiff but sympathy alone is not sufficient to found a claim on negligence. I find as a fact that negligence has not been established. There will be no order as to costs.

Case dismissed.

Solicitors: *Skrine & Co.*

LIM GAIT TONG v. KUNG HEAN CHOW

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) July 3, 1970]

[Penang — Federal Court Civil Appeal No. X. 90 of 1969]

Bankruptcy — Notice — Substituted service — Failure to file copy of advertisement in newspaper at Registry, High Court — Whether this invalidates proceedings — Bankruptcy Rules, 1969, r. 17.

In this case the appellant appealed against a receiving and adjudication order made against him on the ground that the service of the bankruptcy notice on him was defective for failure to comply with the provisions of rule 17 of the Bankruptcy Rules, 1969. Service on the appellant had been effected by substituted service by advertisement in a local newspaper. It was alleged that a copy of the advertisement had not been filed at the Registry, High Court, as required by rule 17.

Held, dismissing the appeal: the failure to comply with rule 17 of the Bankruptcy Rules, 1969 was only a formal defect or irregularity, as it could not reasonably be said that the failure to file a copy of the advertisement had affected the service of the bankruptcy notice and the creditor's petition on the debtor.

Case referred to:-

(1) *Rengasamy Pillai* v. *Comptroller of Income Tax* [1970] 1 M.L.J. 233, P.C.

FEDERAL COURT.

R. Rajasingam for the appellant.

Jag-Jit Singh for the respondent.

Azmi L.P.: We dismissed the appeal with costs and as indicated then, I give my reasons now.

This is an appeal by the debtor against a receiving and an adjudication order made against him, on the ground that he had failed to comply with a bankruptcy notice. The notice was served on the debtor by substituted service effected by the posting of a sealed copy of the order of the court on a notice board of the court and on the front door of the last known place of residence of the debtor and by publication in a local newspaper, *The Straits Echo.* After the service in the manner mentioned above, the debtor filed an affidavit claiming that he had paid part of the amount claimed and that he intended to dispute the act of bankruptcy on the ground that the amount claimed to be due to him was incorrect and far in excess of what was actually due. In reply to that the creditor filed an affidavit in which he maintained that the sum claimed by him in the bankruptcy notice was the correct amount.

At the hearing of the petition the debtor failed to appear but sent a medical certificate to the effect that he was being treated for fever and cough. The learned judge refused to adjourn the matter and proceeded to deal with the petition and make the orders prayed for. In his judgment the learned judge stated that "if there were any valid grounds the court has power under section 92 to rescind or review the orders without an